

**IN THE  
SUPREME COURT OF MISSOURI**

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**No. SC 84948**

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**BRANSON PROPERTIES U.S.A., L.P.  
Appellant,**

**v.**

**DIRECTOR OF REVENUE,  
Respondent.**

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**On Petition for Review from the  
Missouri Administrative Hearing Commission  
Honorable Willard C. Reine, Commissioner**

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**BRIEF OF APPELLANT**

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## **JURISDICTIONAL STATEMENT**

This appeal involves the construction of revenue statutes Sections 144.030.2(4) and 144.030.2(5).<sup>1</sup> The primary issues are: (1) whether Appellant's machinery, equipment and parts purchased during the tax periods in issue were used to manufacture and or produce its intangible entertainment products entitling Appellant to the replacement exemption from sales and use tax on the purchase of said machinery, equipment and parts under Section 144.030.2(4); and (2) whether Appellant's machinery, equipment and parts purchased during the tax periods in issue were used to manufacture its intangible entertainment products and used to establish a new or to expand an existing plant entitling Appellant to the replacement exemption from sales and use tax on the purchase of said machinery, equipment and parts under Section 144.030.2(5).

This Court's review of this case will necessarily involve the construction of Sections 144.030.2(4) and 144.030.2(5) which are revenue laws of the State of Missouri. This Court has exclusive jurisdiction over the issues in this appeal pursuant to Article V, §3 of the Missouri Constitution.

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<sup>1</sup> Unless otherwise stated, all references herein to "Section" are to those Sections of the Revised Statutes of Missouri (R.S.Mo) in effect with respect to the tax periods in issue



## STANDARD OF REVIEW

The decision of the Administrative Hearing Commission (“Commission”) shall be upheld if: (1) it is authorized by law; (2) it is supported by competent and substantial evidence upon the whole record; (3) no mandatory procedural safe guards are violated; and (4) the Commission, where it has discretion, exercises discretion in a way that is not clearly contrary to the Legislature’s reasonable expectations. Section 621.193; *Concord Publishing House, Inc. v. Director of Revenue*, 916 S.W. 2d 186 (Mo. banc 1996). This Court’s review of the law is de novo. *Zip Mail Services, Inc. v. Director of Revenue*, 16 S.W. 3d 588, 590 (Mo. banc 2000), *Southwestern Bell Telephone Co. v. Director of Revenue*, 78 S.W. 3d 763 (Mo. banc 2002).

## **STATEMENT OF FACTS**

### **Introduction**

The basic facts of this case are uncontroverted. Appellant Branson Properties USA, L.P. ("Branson Properties") during the tax periods in issue owned and operated the Branson USA Amusement Park in Branson, Missouri (the "Amusement Park"). Branson Properties acquired the land upon which the Amusement Park was built in 1997 in a foreclosure sale of property formerly known as Mutton Hollow. Branson Properties constructed additional improvements on the land and purchased and placed in service approximately 30 mechanical rides and attractions which were used to manufacture and produce its entertainment products. These entertainment products were sold to the general public and sales tax was collected and remitted to the Missouri Director of Revenue on the receipts derived from the sale of these products.

### **Replacement Machinery and Equipment;**

#### **New or Expanded Facility.**

Branson Properties acquired in December 1997 approximately 40 acres of land located at the junction of Highway 76 and 376 in Branson, Missouri which was formerly the site of an operation known as Mutton Hollow. Branson Properties acquired this property with the intent to convert it to an amusement park. Tr. 13 - 15. The Mutton Hollow operation had closed prior to December, 1997 and its lender had commenced a foreclosure proceeding with respect to the property. Tr.14. Prior to its closing, the Mutton Hollow facility had 30 to 40 retail shops, two theaters and several park rides including a small ferris wheel and a bumper car ride. Tr. 15, 22, 43.

After Branson Properties acquired the Mutton Hollow property it commenced the construction of its amusement park by removing five existing buildings from the property and constructed a new entry building, several retail buildings, parking lots, streets and other infrastructure improvements. The improvements made by Branson Properties encompassed 30-40 percent more space than what was used in the Mutton Hollow operation. Tr. 15, 25, 51-52.

Branson Properties also purchased and installed machinery and equipment consisting of the following amusement rides and attractions in connection with the construction of its Amusement Park (the “Rides and Attractions”).

<b><u>Ride/Amusement</u></b>	<b><u>Description</u></b>	<b><u>Cost</u></b>
Go Karts	Gasoline powered vehicles which travel around a concrete and steel track	\$ 197,800.00
Bumper Carts	Car type carts in a building powered by electricity from the ceiling	67,200.00
Titanic Adventure Slide	Tilted Titanic like boat with the tilted portion forming a water slide	12,525.00
Flying Bob	Musical ride consisting of 16 arms attached to a center axle with enclosed cars on each arm. The arms go up and down and spin in both directions	65,000.00

<b><u>Ride/Amusement</u></b>	<b><u>Description</u></b>	<b><u>Cost</u></b>
Windstorm Roller Coaster	Roller coaster which lifts 40 feet in the air and spirals down at 40 miles per hour	555,000.00
Spider	Rotation ride with 8 arms and buckets and the buckets spin and go up and down at the same time	57,000.00
Laser Fantasy	Laser light show using projector, screens and smoke	122,000.00
28 Mt. Giant Wheel	96 foot Ferris wheel	329,000.00
Seven Carnival Rides	Children's antique car ride, children's airplane ride, children's motorcycle ride	225,000.00
Peter P. Dragon	Dragon shaped structure with seats that go up and down	55,000.00
Aladdin Ride	Ride which goes up and down to simulate Aladdin's carpet ride	80,000.00
Flying Dragon Roller Coaster	Small children's roller coaster	170,000.00
Amusement Park Rides (Amex Zamperla, Inc.)		10,057.90

<b><u>Ride/Amusement</u></b>	<b><u>Description</u></b>	<b><u>Cost</u></b>
Tilt A Whirl	A series of cars which spin and rotate on a platform	20,000.00
Carousel	Carousel ride consisting of fabricated horses which go up and down as they go around with music	12,500.00
Aurora Model BF Pumps & Motors	Motors for waterfall	5,950.00
Motor Bracket Assembly	Bracket for waterfall	2,980.00
Tilt A Whirl Canvass, Canopy, Springs	Canopy for Tilt A Whirl ride described above	1,570.00
Flying Bobs Top	Top for Flying Bob ride described above	4,495.75
Hampton Top	Top for Antique Car Ride described above	1,515.00
Canvas For Flying Bob & Carousel	Part for Flying Bob and Carousel rides described above	3,697.00
Canvas For Tilt A Whirl & Flying Bob	Part for Tilt A Whirl and Flying Bob rides described above	1,820.00
Motorcycle Jump & Combo Center		966.54
Lighting Fixtures Equipment for Scrambler	Lights for ride	2,001.15

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<u>Ride/Amusement</u>	<u>Description</u>	<u>Cost</u>
Lighting for Roller Coaster	Lighting system for Roller Coaster ride described above	<u>7,773.88</u>
<b>TOTAL</b>		<b>\$ 2,010,852.22</b>

Exhibit 1; Tr. 16 - 21.

The Rides and Attractions are mechanical devices with moving parts and are fixed assets which are depreciated as equipment over a 7 year life for accounting purposes. Tr. 16-21, 59-60. The Rides and Attractions replaced the small ferris wheel and bumper cars which were located on the property when Branson Properties acquired it. Tr. 22, 23, 43. In order for the Rides and Attractions to operate safely for their intended purpose, it was necessary that electricity and/or water be supplied to them to operate the moving parts and that an employee operate each Ride and Attraction. Tr. 28-29.

The Amusement Park was opened to the public in May - June, 1999. Joint Exhibit 1; Tr. 30. As a result of the improvements made by Branson Properties to the Mutton Hollow property, and the acquisition and placement of the Rides and Attractions, the Amusement Park experienced an increase in sales, wages, and number of employees as follows:

	<u><b>Tax Years Ended</b></u>		
	<u>December 31,</u> <u>1998</u>	<u>December 31,</u> <u>1999</u>	<u>December 31,</u> <u>2000</u>
Gross Receipts	\$0.00	\$2,075,217.00	\$2,492,677.00

Wages & Salaries	\$0.00	\$1,101,427.00	\$1,333,388.00
No. of Employees	0	450	420

Exhibit 3; Tr. 25 - 26, 57 - 58.

### **Replacement Parts**

During and after the Rides and Attractions were initially placed in service, Branson Properties undertook a safety replacement program where it replaced cotter pins, bolts, nuts and other parts with higher quality parts of the same type in order to enhance the safety of the Rides and Attractions. Tr. 29, 47. During the tax periods in issue, Branson Properties purchased the following parts which replaced existing parts on the Rides and Attractions in connection with its safety replacement program ( the “Replacement Parts”):

#### **(Use Tax Items)**

Levitation Base Socket Unit, Parts	1,900.00
Whip Wire, Pedal Contact Blocks	215.75
Cushion, Headrest, Velcro Hooks	669.69
Vlock, Cable, Wheel, Sheave, Washer	713.15
Parts	58.22
Turnbuckle	49.55
Hook Assby., Bearings, Cap-Car Wheel	482.04

Pin, Lock	72.24
Block, Cable Fork, Wheel, Parts	774.90
Part -Tilt A Whirl, Pin	42.40
Decal, Rubber Drive Sheave	43.23
Nylat Bush	76.60
Rod End, Hitch	189.64
Spring	153.50
Hyfax Wheels	135.00
Shelves, Columns, Displays, Tables	2,513.00
Wheels, Hose	11,177.00
Wheels, Drag Dos, Bolts, Cotter Pins	<u>9,985.77</u>
<b>Subtotal - Use Tax Items</b>	<b>\$ 29,251.68</b>

**(Sales Tax Items)**

Collars, Safety Pins, Bolts, Nylocks, Taplocks, Sockets, Traps, Hex	\$ 23,613.48
Grease Gun, Parts, Seals, Hose	123.71
Parts, Seals, Rivets	137.59
Countersink	17.50
Caliper, Nylock	624.15
Milton Part	<u>42.85</u>
<b>Subtotal - Sales Tax Items</b>	<b><u>\$ 24,559.28</u></b>

**Total Cost of Replacement Parts      \$ 53,810.96**

Exhibits 1 and 2; Tr. 29, 40 - 47.



The Replacement Parts were necessary for the Rides and Attractions to operate in a safe and reliable manner. Tr. 21-22, 44-46.

### **Manufacturing and Producing**

### **Entertainment Services and Products**

The Rides and Attractions were used directly by Branson Properties in producing and manufacturing the entertainment products sold to its customers. Joint Exhibit 1; Tr. 30, 32. Branson Properties manufactures entertainment products by taking machinery, equipment and parts, adding power (by water and/or electricity), adding lights, designs and other atmosphere or esthetic items, performers and operators, to create for its customers a new and different intangible product of entertainment. Tr. 27 - 29, 32, 45. Branson Properties, at its Amusement Park, manufactured and produced entertainment products including the thrills, sensations, excitement, enjoyment, amusement and fun created by the Rides and Attractions, the theatrical performances, the games, the atmosphere and the other entertainment activities. Joint Exhibit 1. The Amusement Park is the plant or facility which manufactures and produces Branson Properties' entertainment products. Joint Exhibit 1; Tr. 27 - 29, 32, 45.

### **Sale of Entertainment Products**

Branson Properties' customers purchased its entertainment products by either purchasing a super pass wrist band which allowed the customer to ride or use all of the Rides and Attractions offered or by purchasing individual tickets permitting the customer to ride or use only a specific Ride or Attraction. Joint Exhibit 1; Tr. 26. Branson Properties collected and remitted to the Missouri Director of Revenue sales taxes due on all fees and other charges collected from its customers for the entertainment products

provided. Tr. 26- 27, 59.

## POINTS RELIED ON

**I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING RESPONDENT’S ASSESSMENTS BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT THE PURCHASES OF MACHINERY, EQUIPMENT AND PARTS BY BRANSON PROPERTIES WERE EXEMPT FROM MISSOURI SALES AND USE TAX UNDER SECTION 144.030.2(4) BECAUSE THEY CONSTITUTE REPLACEMENT MACHINERY EQUIPMENT AND PARTS AND WERE USED TO MANUFACTURE AND/OR PRODUCE PRODUCTS WITHIN THE MEANING OF THAT SECTION.**

*Blevens Asphalt Construction Company v. Director of Revenue,*

938 S.W. 2d 899 (Mo banc 1997)

*Bridge Data Company v. Director of Revenue,*

794 S.W. 2d 204 (Mo. banc 1990)

*DST Systems v. Director of Revenue,*

43 S.W. 3d 799 (Mo. banc 2001)

*House of Lloyd, Inc. v. Director of Revenue,*

824 S.W. 2d 914 (Mo. banc1992)

*International Business Machines Corp. v. Director of Revenue,*

958 S.W. 2d 554 (Mo banc 1997)

*Kansas City Power & Light v. Director of Revenue,*

2002 WL 1611617 (Mo banc 2002)

*Metro Auto Auction v. Director of Revenue,*

707 S.W. 2d 397 (Mo banc 1986)

*Ovid Bell Press Incorporated v. Director of Revenue,*

45 S.W. 3d 880 (Mo banc 2001)

*Southwestern Bell Telephone Company v. Director of Revenue,*

78 S.W. 3d 763 (Mo banc 2002)

*Stanley v. Director of Revenue,*

623 S.W. 2d 246 (Mo banc 1981)

### **Missouri Statutes and Regulation**

Section 144.010.1(10)(a)

Section 144.020.1(2)

Section 144.030.2(4)

Section 621.189

Section 621.193

12 CSR 10 - 111.010(2)(D)

**II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING RESPONDENT’S ASSESSMENTS BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT THE PURCHASES OF THE MACHINERY, EQUIPMENT AND PARTS BY BRANSON PROPERTIES WERE EXEMPT FROM MISSOURI SALES AND USE TAX UNDER SECTION 144.030.2(5) BECAUSE SUCH MACHINERY, EQUIPMENT AND PARTS WERE USED TO MANUFACTURE PRODUCTS IN A NEW OR EXPANDED PLANT WITHIN THE MEANING OF THAT SECTION.**

*Bridge Data Company v. Director of Revenue,*

794 S.W. 2d 204 (Mo. banc 1990)

*International Business Machines Corp. v. Director of Revenue,*

958 S.W. 2d 554 (Mo banc 1997)

### **Missouri Statutes and Regulation**

Section 144.030.2(4)

Section 144.030.2(5)

Section 621.189

Section 621.193

12 CSR 10 - 111.010(2)(D)

## ARGUMENT

**I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING RESPONDENT’S ASSESSMENTS BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT THE PURCHASES OF MACHINERY, EQUIPMENT AND PARTS BY BRANSON PROPERTIES WERE EXEMPT FROM MISSOURI SALES AND USE TAX UNDER SECTION 144.030.2(4) BECAUSE THEY CONSTITUTE REPLACEMENT MACHINERY EQUIPMENT AND PARTS AND WERE USED TO MANUFACTURE AND/OR PRODUCE PRODUCTS WITHIN THE MEANING OF THAT SECTION.**

### **Introduction**

This Court in *Southwestern Bell Telephone Company v. Director of Revenue*, 78 S.W. 3d 763 (Mo banc 2002) acknowledged the difficulty of applying the replacement and manufacturing exemptions to intangible products stating: “One area of specific difficulty in Missouri has been the application of the manufacturing sales and use tax exemptions to intangible products or services. Two somewhat interrelated issues, the definitions of ‘product’ and ‘manufacturing’, have been at the heart of this jurisprudence.” 78 S.W.3d at 766. This case, involving entertainment products, is yet another case dealing with the application of these sales and use tax exemptions to intangible services and products.



The Commission’s legal analysis and basis for this decision was cursory at best<sup>2</sup> and is contained essentially in one paragraph which reads as follows:

“No Missouri court has ever determined that an amusement park is engaged in manufacturing, and we decline to do so. In *Southwestern Bell*, the exemption was applied to telephone services because the human voice input was transformed to electronic impulses and reproduced so that the output was not the same voice but a complete reconstruction of it. *Southwestern Bell*, 78 S.W.3d at 768. BPU is engaged in providing amusement, which is not manufacturing. Therefore, it is not entitled to the exemptions under section 144.030.2(4) and (5).”

The Commission erroneously concluded that the replacement exemptions under Section 144.030.2(4) did not, as a matter of law, apply. The Commission failed to state a substantive basis for its decision and also failed to consider or address the effect of the legislature’s inclusion in 1998 of the term “producing” in Section 144.030.2(4).

#### **Elements of the Replacement Exemption Under Section 144.030.2(4)**

Section 144.030.2(4) provides an exemption from the Missouri sales and use tax for the following:

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<sup>2</sup> For the Court’s convenience, a copy of the Administrative Hearing

Commission’s opinion is included in the Appendix to this brief.

“(4) Replacement machinery, equipment, and parts and the materials and supplies solely required for the installation or construction of such replacement machinery, equipment, and parts, used directly in manufacturing, mining, fabricating or producing a product which is intended to be sold ultimately for final use or consumption; . . .”

The replacement machinery, equipment and parts exemption under Section 144.030.2(4) is straight forward and applies if the taxpayer purchases:

- (1) replacement machinery, equipment and parts;
- (2) used directly in manufacturing or producing a product;
- (3) intended to be sold ultimately for final use and consumption.

### **Replacement Machinery and Equipment and Parts**

There is no question that the Rides and Attractions and Replacement Parts constitute “machinery, equipment and parts within the meaning of the exemption. The Commission so found in its decision (Findings of Fact¶ 8). These Rides and Attractions and Replacement Parts clearly constitute machinery, equipment and parts under Respondent’s own regulation since they “have a degree of permanence to the business, contribute to multiple processing cycles over time and generally constitute fixed assets other than land and buildings for purposes of business and accounting practices.” See Regulation 12 CSR10-111.010(2)(D).

The next issue is whether the Rides and Attractions and Replacement Parts were “replacement machinery, equipment and parts” within the meaning of the exemption. The statute does not define the

word “replacement.” In the absence of a statutory definition, words used in a statute are construed in accordance with their plain and ordinary meaning. *Wolff v. Director of Revenue*, 762 S.W.2d 29 (Mo. Banc 1988). The ordinary meaning of “replacement” is “the act of replacing or the state of being replaced; substitution”. Webster’s Third New International Dictionary (1986). The Commission found as a fact that Branson Properties’ “Ferris Wheel and Bumper Cars purchased and installed by Branson Properties replaced the ones that were present when it acquired the property.”<sup>3</sup> The Commission further found as a fact that Branson Properties “replaced various parts to enhance the safety of the rides.”<sup>4</sup>

Accordingly, the Commission found that the giant ferris wheel and bumper cars and the Replacement Parts purchased by Branson Properties in the tax periods in issue were “replacement” within the meaning of Section 144.030.2(4). Branson Properties’ position is that all the Rides and Attractions in issue were replacements because the law does not require that replacements be on a one for one basis. Branson Properties replaced the small ferris wheel and bumper cars existing on the property when it was originally acquired with all the Rides and Attractions here in issue. The two rides were replaced with approximately 30 rides and mechanical attractions as part of Branson Properties’ major renovation of the park. The ordinary definition of the word “replacement” would not preclude the replacement of one ride with two rides or, in this case, two rides with thirty rides. This construction is entirely consistent with the 1998 legislative changes to Section 144.030.2(4) which significantly expanded the replacement exemption.

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<sup>3</sup> Decision, p.2, footnote 1.

<sup>4</sup> Decision, p. 3, Finding of Fact ¶7.

Prior to the 1998 amendments to Section 144.030.2(4), the statute read, in pertinent part as follows:

“(4) Machinery and equipment, and materials and supplies solely required for the installation or construction of such machinery and equipment, replacing and used for the same purpose as the machinery and equipment replaced by reason of design or product changes, which is purchased for and used directly for manufacturing or fabricating a product which is intended to be sold ultimately for final use and consumption;” (Emphasis added).

The emphasized language could be construed to require a one for one replacement since the language requires a replacement to be used for the same purpose and must replace the original equipment by reason of a design change. The 1998 legislative changes expanded the exemption under Section 144.030.2(4) by not only adding the words “parts” and “producing” to the statute as discussed hereafter, but also eliminated the emphasized language. The legislature then added the word “replacement” as an adjective before the terms “machinery, equipment and parts”. These changes clearly reflected the legislature’s intent to expand the exemption and clearly eliminated any requirement to view replacements on a one to one basis or requiring a design or product change. The law and the record supports that the Replacement Parts and all Rides and Attractions were replacement machinery, equipment and parts within the meaning of Section 144.030.2(4).

### **Used Directly in Manufacturing a Product**

This case involves the manufacturing and producing of intangible entertainment products. This

Court recently in *Southwestern Bell Telephone Company v. Director of Revenue*, 78 S.W. 3d 763 (Mo banc 2002) dealt with the issue of the application of the manufacturing sales and use tax exemptions under Section 144.030.2(4) and (5) to intangible products or services. This Court in *Southwestern Bell* confirmed its holding in *International Business Machines Corp. v. Director of Revenue* 958 S.W. 2d 554 (Mo banc 1997) that “a product is an output with a market value, it can be either tangible personal property or a service.” The *Southwestern Bell* case dealt with Southwestern Bell’s purchases of machinery and equipment used to produce basic telephone service as well as vertical telephone products such as call-waiting and caller ID. The machinery and equipment included computers, electronic analog and digital switching devices, circuit equipment, and various other components involved in transmitting and processing information required for telephone communications and services. This Court determined that the Administrative Hearing Commission's decision to deny the exemption was incorrectly based on its finding that telephone services were not the manufacturing of a product. This Court reaffirmed that services and intangible products are products which can be manufactured, and therefore, are eligible for Missouri sales and use tax manufacturing exemptions.

The Branson Properties’ manufacturing and producing of the entertainment products here in issue are similar, in nature, to that of the telephone services in *Southwestern Bell*. Branson Properties’ Rides and Amusements and Replacement Parts together with other items and services such as power, operators, lights, designs, performers, atmosphere and esthetics creates a new and different product having a new market value to its customers as evidenced by their willingness to pay for such entertainment services and products. Commissioner Reine wrongly concluded in *Southwestern Bell*, that telephone services cannot be manufactured or produced. He also wrongly concluded that the entertainment

products created by Branson Properties in this case cannot be manufactured or produced.

**Used Directly in Producing a Product**

The Commission’s decision focused solely on the term “manufacturing” and wholly failed to consider or address the statutory term “producing” which was added to the replacement exemption in 1998. The 1998 amendments to Section 144.030.2(4) added the word “parts” to the exemption and added the words “or producing” so that the replacement exemption now applicable reads as follows:

“(4) Replacement machinery, equipment, and parts and the materials and supplies solely required for the installation or construction of such replacement machinery, equipment, and parts, used directly in manufacturing, mining, fabricating or producing a product which is intended to be sold ultimately for final use or consumption;”

The legislature’s addition of the words “or producing” was raised by Branson Properties in its brief to the Commission and was either ignored by the Commission or assumed to be synonymous with “manufacturing”.

As this Court stated in *Wolff Shoe Company v. Director of Revenue*, 762 S.W.2d 29 (Mo. Banc 1988):

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning [citing] *Metro Auto Auction v. Director of Revenue*, 707 S.W.2d 397, 401 (Mo. banc 1986).

In a case directly on point, this Court noted in *House of Lloyd, Inc. v. Director of Revenue*, 824 S.W.2d 914 (Mo banc 1992) that:

“It is not logical to define the words “manufacturing” and “fabricating” as synonymous within the context of § 144.030.2(5), since to do so would render one of them surplusage [citing *Stanley v. Director of Revenue*, 623 S.W.2d 246, 250 (Mo. banc. 1981)]” 824 S.W.2d 914 at 917-18.

Similarly, it is not logical to define the words “producing” and “manufacturing” in Section 144.030.2(4) as synonymous for the same reasons. The word “producing” was specifically added to the replacement exemption at the same time the legislature expanded the exemption to include “parts” and remove the requirements that replacements be used for the same purpose and must have resulted from a design or product change. The Commission and Respondent have recognized that the replacement exemption was expanded to include “parts” but failed to recognize the expansion created by the word “producing”. The word “producing” has a much broader meaning than the word “manufacture”; it means “to give being, form or shape to; to make other from raw materials; manufacture . . . to make economically valuable; to make or create so as to be available for satisfaction of human wants” *Webster’s Third New International Dictionary* (1986).

The Commission’s decision denying the replacement exemption because the creation of entertainment products or services is not “manufacturing” does not correctly apply the statutory language. All Branson Properties must do is use its replacement machinery, equipment and parts to produce, *i.e.*, to give being to, to make economically valuable or to make or create, its entertainment product or

services. This, Branson Properties clearly did and the record so establishes.<sup>5</sup> The Rides and Attractions and Replacement Parts were used directly in producing and manufacturing the entertainment services and products that Branson Properties sold to its customers. Joint Exhibit 1; Tr. 30, 32.

**Intended to Ultimately be Sold for Final Use and Consumption**

The last element of the replacement exemption requires that a product be “intended to ultimately be sold for final use and consumption”. In *Ovid Bell Press, Inc. v. Director of Revenue*, 45 S.W. 3d 880 (Mo banc 2001), this Court, citing *DST Systems v. Director of Revenue*, 43 S.W.3d 799, 803 (Mo. banc 2001); *International Business Machines Corp. v. Director or Revenue*, 958 S.W.2d 554, 557-58 (Mo. banc 1997) and *Blevins Asphalt Constr. Co. v. Director of Revenue*, 938 S.W.2d 899, 901 (Mo. banc 1997) held that products “intended to be sold ultimately for final use or consumption” requires the element of a “sale” of the product within the meaning of the sales tax law. The issue of a sale at retail was recently dealt with by this Court in *Kansas City Power and Light v. Director of Revenue*, 83 S.W. 3d 548, (Mo. banc 2002). The key issue in *Kansas City Power and Light v. Director of Revenue* (KCP&L) was whether KCP & L's sales of electricity to Hyatt for use in its customer space were taxable as "sales at retail". This Court stated:

“Clearly under the Missouri statutes sales of electricity are subject to tax. Section 144.020.1(3) states: A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows: ... (3) A tax equivalent

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<sup>5</sup> See Joint Exhibit 1; Tr. 27 - 30, 32, 45, 47 - 48.



to four percent of the basic rate paid or charged on all sales of electricity or electrical current, water and gas, natural or artificial, to domestic, commercial or industrial consumers; . . . Missouri statutes also make clear that sales of electricity can qualify as sales at retail even though electricity is not tangible personal property, stating: Where necessary to conform to the context of sections 144.010 to 144.525 and the tax imposed thereby, the term "sale at retail" shall be construed to embrace: . . . (b) Sales of electricity, electrical current, water and gas, natural or artificial, to domestic, commercial or industrial consumers"; 83 S.W.3d at 549 (Mo banc 2002).

In this case, Branson Properties' receipts from the sale of its entertainment products and services are also taxed under Section 144.020.1. Section 144.020.1(2) imposes "a tax equivalent to four percent of the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement entertainment or recreation, games and athletic events". Section 144.010.1(10)(a) treats Branson Properties' receipts from admission and fees as a sale at retail providing:

"Where necessary to conform the context of Sections 144.010 to 144.525 and the tax imposed thereby, the term 'sale at retail' shall be construed to embrace:

(a) sales of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events;"

Branson Properties collected and paid to the Missouri Director of Revenue all applicable sales tax on these receipts. The analysis used in *KCP & L*, *DST*, *IBM* and *Ovid Bell*, are equally applicable in this case. Branson Properties' products were "intended to be (and were actually) sold ultimately for final use or consumption" and Branson Properties meets this requirement of the exemption.

For the foregoing reasons, Branson Properties respectfully requests that this Court find that the Rides and Attractions and Replacement Parts were replacement machinery, equipment and parts, used in manufacturing or producing its entertainment products which were intended to be (and were actually) sold for final use and consumption.

**II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING RESPONDENT'S ASSESSMENTS BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT PURCHASES OF THE MACHINERY, EQUIPMENT AND PARTS BY BRANSON PROPERTIES WERE EXEMPT FROM MISSOURI SALES AND USE TAX UNDER SECTION 144.030.2(5) BECAUSE SUCH MACHINERY, EQUIPMENT AND PARTS WERE USED TO MANUFACTURE PRODUCTS IN A NEW OR EXPANDED PLANT, WITHIN THE MEANING OF THAT SECTION.**

**Elements of the New or Expanded Plant Exemptions Under Section 144.030.2(5)**

Section 144.030.2(5) provides an exemption from the Missouri sales and use tax for the following:

“(5) Machinery and equipment, and parts and the materials and supplies solely required for the installation or construction of such machinery and equipment, purchased and used to establish new or to expand existing manufacturing or fabricating plants in the state of such machinery and equipment is used directly in manufacturing, mining or fabricating a product which is intended to be sold ultimately for final use or consumption.”

The exemption for machinery, equipment and parts under Section 144.030.2(5) (the “new or expanded plant exemption”) contains essentially the same elements as the replacement

exemption,<sup>6</sup> under Section 144.030.2(4), with two exceptions. First, the machinery, equipment and parts do not have to be a “replacement”. Secondly, the machinery, equipment and parts must be used to establish new or to expand an existing manufacturing plants in the state. The Rides and Attractions and Replacement Parts not only fall within the replacement exemption but also within the new or expanded plant exemption as hereinafter set forth.

Whether the Amusement Park constitutes a new plant or an expansion to an existing plant is not crucial because either one qualifies for the exemption. Although the substantial renovation and conversion of the retail Mutton Hollow property to an amusement park could justify the conclusion that it was a new plant. In addition, the substantial renovations clearly constituted an expansion of the plant. The evidence is uncontroverted that the Amusement Park encompassed 30 - 40% more area than the Mutton Hollow operation and the sales, wages and employees at the Amusement Park increased as a direct result of the renovations.<sup>7</sup> These increases in production, employment and number of products meet the definition of an expanded plant under Missouri ~~Regulation~~ Manufacturing Plant 11.010(2)(B).

The law is well settled that the terms “manufacturing” and “manufacturing plant” for purposes of Sections 144.030.2(4) and (5) are not restricted to traditional manufacturing type operations involving tangible personal property. See *Bridge Data Company v. Director*, 794 S.W. 2d 204 (Mo banc

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<sup>6</sup> The elements requiring that the Rides and Attractions and Replacement Parts: (1) constitute machinery, equipment and parts; (2) used directly in manufacturing a product and (3) which is intended to be sold for final use and consumption, are discussed in Section I (pp.23-34) and are equally applicable to the new or expanded plant exemption.

<sup>7</sup> See Joint Exhibit 1, Exhibit 3, Tr. 15-22, 25-26, 51-52, 57-58.

1990)(computer processing room where data was inputted and processed qualified as manufacturing and its facility was a manufacturing plant); *International Business Machines v. Director of Revenue*, 958 S.W. 2d 554 (Mo banc 1997) (additional computers added to process information was manufacturing and the data processing center area constituted an expanded manufacturing plan). Branson Properties' Amusement Park, like the data processing facility in *Bridge Data* and *International Business Machines*, was devoted to manufacturing its products. The Amusement Park was the facility where these significant manufacturing activities occurred. Therefore, the Amusement Park constitutes the manufacturing plant.

## CONCLUSION

Branson Properties, at its Amusement Park, manufactured and produced entertainment services and products by taking its Rides and Attractions, adding power (by water and/or electricity), adding lights, designs and other atmosphere or esthetic items, performers and operators, to create for its customers a new and different intangible product of entertainment having a new market value. Joint Exhibit 1; Tr. 27 - 29, 32, 45. The Replacement Parts were used directly by Branson Properties to replace parts on its Rides and Attractions which were used directly in producing and manufacturing its entertainment services and products. Joint Exhibit 1, Tr. 27 - 29, 30, 21, 45, 47 - 48. Branson Properties' entertainment services and products included, the thrills, sensations, excitement, enjoyment, amusement and fun created by the Rides and Attractions, the atmosphere and the other entertainment activities at the park. Joint Exhibit 1; Entire record. These entertainment products were sold to Branson Properties customers and sales tax was collected and remitted to the Missouri Department of Revenue on these sales.

Accordingly, not only are Branson Properties's Rides and Attractions and Replacement Parts used directly in manufacturing and producing its products they constitute replacements qualifying for exemption under Section 144.030.2(4).<sup>8</sup> They also were used either to establish a new manufacturing plant or to expand an existing one and qualify for the new or expanded plant exemption under Section 144.030.2(5).

The granting of exemptions under Sections 144.030.2(4) and (5) to Branson Properties is consistent with the legislative purpose of these exemptions. As this Court noted in *West Lake Quarry & Material Co., Inc. v. Schaffner*, 451 S.W. 2d 140, 142 (Mo 1970), the clear legislative purpose of the enactment of the exemptions was to encourage economic development. Once the clear purpose is determined, that purpose should not be thwarted by artificial rules of construction. *Lastra v. Intercontinental Investments Co., Inc. v Director*, 745 S.W. 2d 703, 705 (Mo. App. 1987). Branson Properties' renovations to a closed facility, its multi-million dollar investment in machinery, equipment and parts and its employment of over 400 employees, clearly meets the purpose and objective of the replacement exemption and the new or expanded plant exemption. Furthermore, Branson Properties paid all sales taxes to the State of Missouri on the sales of its entertainment products.

For all of the foregoing reasons, it is respectfully requested that this Court determine that the purchases by Branson Properties of the machinery, equipment and parts in issue are exempt from sales and use tax under Sections 144.030.2(4) and (5) and reverse the Commission with instruction that the assessments against Branson Properties be dismissed.

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<sup>8</sup> See pp 12-13, *supra*.

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ATTORNEYS FOR BRANSON PROPERTIES

**Certification of Service and of Compliance with Rule 84.06(b) and (c)**

The undersigned hereby certifies that on this 13th day of February 2003, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, overnight mail, postage prepaid, to:

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The undersigned certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 6407 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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Richard E. Lenza